Supreme Court, U.S.
FILED
97-1563 DEC 15 1997
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CARL R. LUEM,
Petitioner,

vs.

PATRICIA A. BILLETTER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court deny due process to Petitioner by denying him the right to substitute in legal counsel at his own expense before commencement of a civil trial?
2. Did the Ninth Circuit Court of Appeals decide an important federal question in way that conflicts with relevant decisions of this Court?

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I. Petitioner contends that he had an absolute right to retain private counsel at his own expense, as long as the trial was not delayed. This was a constitutional right guaranteed him under the due process clause of the Fifth Amendment, and he was effectively denied a hearing when the District Court denied the Motion to Substitute in an attorney. 6

II. Once the Petitioner's request for a continuance was withdrawn by Petitioner's chosen counsel, the District Court had no discretion to deny the Motion to Substitute Attorney under either the Local Rules or the Fifth Amendment. 6

III. The Ninth Circuit Court of Appeals upheld the District Court's denial of Petitioner's Fifth Amendment rights, in contravention of the Supreme Court's prior holding in *Powell vs. State of Alabama*. 6

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OPINIONS BELOW

1. Memorandum of Decision on Appeal to Ninth Circuit Court of Appeals, case nos. 96-55597, 96-55601, as filed on August 7, 1997, [Appendix A Herein].

2. Findings of Fact and Conclusions of Law After Court Trial as filed on April 3, 1996, in the United States District Court, Central District of California, Southern Division, in case no. SA CV 92-221-AHS (EEX) [Appendix B Herein].

3. Judgment filed on April 3, 1996, in the United States District Court, Central District of California, Southern Division, in case no. SA CV 92-221-AHS (EEX) [Appendix C Herein].

4. Findings of Fact and Conclusions of Law After Court Trial as filed on April 3, 1996, United States District Court, Central District of California, Southern Division, in case no. SA CV 93-354-AHS (EEX) [Appendix D Herein].

5. Judgment filed on April 3, 1996, in the United States District Court, Central District of California, Southern Division, in case no. SA CV 93-354-AHS (EEX) [Appendix E Herein].

6. Order Denying Petition for Rehearing, as filed on October 22, 1997, [Appendix F Herein].

7. Order Consolidating cases, in the Ninth Circuit Court of Appeals, filed on June 3, 1996 [Appendix G Herein].

JURISDICTION

The judgment on appeal that is sought to be reviewed in this Petition for Writ of Certiorari is the memorandum of decision on appeal to the Ninth Circuit Court of Appeals as filed on August 7, 1997, in Case Nos. 91-55597, 96-55601.

A Petition for Rehearing was then filed, and an order denying the Petition for Rehearing was filed on October 22, 1997, in Case Nos. 91-55597, 96-55601.

The statutory provision believed by Petitioner to confer on this Court the jurisdiction to review on a writ of certiorari the judgment in question is the Fifth Amendment to the Constitution of the United States of America, and specifically the due process clause contained therein.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V:

> "No person shall be . . . deprived of . . . property, without due process of law. . ."

> "If in any case, civil or criminal, a state or federal Court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial

> of a hearing, and, therefore, of due process in the constitutional sense."

Powell vs. State of Alabama (1932) 287 U.S. 45, 53 S. Ct. 55, 64, 77 L.Ed. 158; accord, *Roberts vs. Anderson* (10th Cir. 1933) 66 F.2d 874; *Rex Investigative and Patrol Agency, Inc. vs. Collura* (E.D.N.Y. 1971) 329 F. Supp. 696, 699; *R.B. Potashnick vs. Port City Contr. Co.* (5 Cir. 1980) 609 F.2d 1101.

STATEMENT OF THE CASE

The Respondent, PATRICIA BILLETTER, retained the Petitioner, CARL R. LUEM, a licensed obstetrician gynecologist, to perform cosmetic surgery on both of her breasts in October of 1989. The Respondent was concerned over an asymmetry in her breasts. Petitioner then performed a breast augmentation to the left breast and a breast reduction to the right breast.

Infection and necrosis of the breast tissue occurred post-operatively, and defendant performed a subsequent surgery to each breast on two occasions thereafter.

Respondent complained of scarring and disfigurement afterwards, and initiated a State Court action in California, in Orange County Superior Court, on January 23, 1991, for medical malpractice against the Petitioner.

Petitioner thereafter filed a Chapter 7 Bankruptcy, and Respondent had her State Court action removed to Bankruptcy Court, and also filed a separate action in Bankruptcy Court alleged her cause of action to be non-dischargeable under 11 U.S.C. § 523(a)(6).

The Bankruptcy Court then transferred both actions to the U.S. District Court, per the authority of 28 U.S.C.

§157(b)(5). The case was assigned to U.S. District Judge Alicemarie H. Stotler on July 27, 1993.

The Petitioner then substituted himself in pro se on U.S. District Court Case No. 93-354 on August 22, 1995, and on U.S. District Court Case No. 92-221 on or about October 24, 1995. Trial was set for November 7, 1995.

On November 6, 1995, Petitioner lodged a substitution of attorney to substitute in Lawrence A. Strid of Burge, Strid and Dickinson as his counsel in both actions, along with an Ex Parte Application to allow substitution of attorney and to continue the trial.

At the hearing of Petitioner's Motion for a Continuance and to substitute attorneys, as heard the morning of the trial on November 7, 1995, Petitioner's chosen counsel explained to the Court that the Petitioner, a Georgia state resident, was performing surgery that morning in Georgia, but that he was prepared to fly over and be in Court.

The Court denied the Motion to Substitute Attorneys, even after Dr. Luem's counsel represented that he had the authority to rescind the request for a continuance and to proceed immediately with trial as Dr. Luem's attorney.

Notwithstanding this offer, the court still refused to allow the substitution and ordered trial to commence forthwith. Without having his chosen counsel allowed to enter into the trial, and without himself being present, the effect of this ruling was to allow the Respondent to present, in effect, a default prove-up, even though no default was ordered by the Court.

Trial was concluded on both cases on November 7, 1995.

Findings of Fact and Conclusions of Law by the plaintiff were filed in Case No. SA CV 92-221-AHS (RWRx) on April 3, 1996. Findings of Fact and Conclusions of Law

by the Respondent were filed in Case No. SA CV 93-354-AHS (RWRx) on April 3, 1996.

Judgment in SACV 92-221-AHS (RWRx) was filed on April 3, 1996 in the amount of $1,286,580.00.

Judgment in SACV 3-354-AHS (RWRx), adjudicating the judgment in Case No. SACV 92-221-AHS (RWRx) to be a non-dischargeable debt under 11 U.S.C. §523(a)(6), was filed on April 3, 1996.

Dr. Luem lodged another Substitution of Attorney on both cases following trial, on November 22, 1996. The District Court made a point of not approving these subsequent Substitutions until judgment was filed on April 3, 1996.

A notice of appeal was filed in SACV92-221-AHS (RWRX) on April 19, 1996.

A notice of appeal was filed in SACV93-354-AHS (RWRx) on April 19, 1996 also.

Both of these appeals were ordered consolidated by the Ninth Circuit Court of Appeals on June 3, 1996.

A memorandum of decision was filed on August 7, 1997 in the Ninth Circuit Court of Appeals, nos. 96-55597, 96-55601, affirming the judgment of the District Court.

The Ninth Circuit specifically held that the District Court's refusal to substitute counsel violated no rights of the respondent, quoting case authority for the proposition that there is generally no right to counsel in civil cases.

Petitioner filed a Petition for Rehearing on August 20, 1997, the sole contention of which was that while there is no constitutional right to court-appointed counsel in civil cases, that there is a constitutional right to privately-retained counsel in civil cases that has been recognized by the U.S. Supreme Court.

The Petition for Rehearing was denied on October 22, 1997.

REASON FOR GRANTING THE WRIT

Petitioner does not dispute the fact that there is no constitutional right to court-appointed counsel in a civil case.

Petitioner does contend that he had an absolute right to retain private counsel at his own expense, so long as the trial was not delayed. This was a constitutional right guaranteed him under the due process clause of the Fifth Amendment, and he was effectively denied a hearing when the District Court denied the Motion to Substitute in an attorney.

Once the Petitioner's request for a continuance was withdrawn by Petitioner's chosen counsel, the District Court had no discretion to deny the Motion to Substitute Attorney under either the Local Rules or the Fifth Amendment.

Petitioner is now burdened with a non-dischargeable judgment in the amount of $1,286,580.00.

The Ninth Circuit Court of Appeals upheld the District Court's denial of Petitioner's Fifth Amendment rights, in contravention of the Supreme Court's prior holding in *Powell vs. State of Alabama* (1932) 287 U.S. 45, 69; 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

CONCLUSION

Petitioner had an absolute right to retain private counsel at his own expense, so long as the trial was not delayed. This was a constitutional right guaranteed him under the Fifth Amendment, and he was effectively denied a hearing when the District Court denied the Motion to Substitute Attorney.

DATED: November 26, 1997.

Respectfully submitted,

BURGE, STRID AND DICKINSON

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